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July 11, 2003

Chief Justice of California
and Associate Justices of the California Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: S115699–Agua Caliente Band v. Superior Court (FPPC)

To the Chief Justice of California and Associate Justices of the California Supreme Court:

Pursuant to this court's request dated July 2, 2003, Real Party in Interest Fair Political Practices Commission (hereinafter "FPPC") submits this letter brief answer in response to the petition for review filed by Petitioner Agua Caliente Band of Cahuilla Indians (hereinafter the "Agua Caliente Band").

I.

INTRODUCTION

In its most fundamental sense, this case involves the affirmative assertion of the sovereign right and power of the State of California, secured under the Guarantee Clause and the Tenth Amendment to the United States Constitution, to control its own electoral processes and protect the integrity of its elections and legislative processes. As set forth in more detail below, the Political Reform Act (Gov't Code §§ 81000-91014) (hereinafter "PRA") is an enactment of the People of the State of California to protect the integrity of its governmental elections and legislative processes. The FPPC is charged with the administration and enforcement of the PRA. In the regular course of its statutory duties, the FPPC brought an action to enforce the PRA against the Agua Caliente Band. The Agua Caliente Band asserted that it is exempt from enforcement of the PRA by virtue of the federal doctrine of tribal sovereign immunity from suit. The superior court properly

ruled that extension of this court-created doctrine so as to abrogate rights reserved to the States by the Guarantee Clause, would violate the Tenth Amendment to the United States Constitution.

This case presents questions of first impression in California. At least one other state has refused a tribal campaign committee's request to enjoin enforcement of state campaign contribution laws against the committee. *Minnesota State Ethical Practices Board v. Red Lake DFL Committee*, 303 N.W.2d 54 (Minn. 1981). The United States Supreme Court, however, has not yet considered any case presenting the question of whether the states have authority to enforce their own laws protecting the integrity of state elections against Indian tribes. *No* state or federal appellate court has determined that tribes have authority to interfere with states' rights of self-government, either as a matter of federal common law or by virtue of any federal statute. *No* case has held that tribes participate in state elections on a basis different from any other citizen or association.

The FPPC has no choice but to comply with the statutory mandate that it enforce the PRA vigorously for the benefit of all of its citizens, including petitioner's members. Cal. Const. Article III, section 3.5; Gov't Code § 81002(f). This court should resolve these important questions, so that the FPPC and all Californians will know that the FPPC may enforce the PRA against the largest donors to California political campaigns.

This case involves an issue of great urgency to Californians and to the FPPC. The Agua Caliente Band is a multi-million dollar contributor to California election campaigns and an active lobbyist employer. Other federally recognized Indian tribes are similarly involved in efforts to influence the political processes of the State of California through contributions of money at both the state and local levels. This case and the Agua Caliente Band's efforts to preclude enforcement of the PRA against it have created great uncertainty as to the FPPC's authority to enforce the PRA against any federally recognized Indian tribes. Indeed, in the ruling that is the subject of a request for judicial notice by petitioner, a different department in the same superior court ruled that federally recognized Indian tribes are protected from enforcement of the PRA by the doctrine of tribal sovereign immunity from suit.

Based on the urgent need under California Constitution Article III, section 3.5 for authoritative resolution of these issues, the FPPC requests that this court grant review and decide the matter itself, consistent with the superior court's ruling below. *See Central Pathology Service Medical Clinic, Inc. v. Superior Court (Hull)*, 3 Cal. 4th 181 (1992) (court reviewed case on merits without intermediate appellate review).

II.

QUESTIONS PRESENTED FOR REVIEW

The Agua Caliente Band states that the issue presented for review is whether the Tenth Amendment authorizes "a state court to unilaterally create an exception to tribal suit immunity by weighing state versus tribal interests in determining whether suit immunity should apply?" (Petition p. 3). However, the superior court neither created an exception to the doctrine of sovereign immunity from suit nor balanced state and tribal interests. Rather, the superior court properly declined to extend the court-created doctrine of immunity from suit in derogation of sovereign rights reserved to the States under the United States Constitution. Accordingly, the FPPC submits that the issues raised by the petition are governed by operation of the Guarantee Clause, Article IV, section 4, of the United States Constitution and the Tenth Amendment:

Did the States, through Article IV, section 4 and the Tenth Amendment of the United States Constitution, reserve the power to protect their sovereign governments so that Congress is barred from abrogating--expressly or by implication--state court judicial enforcement of state laws protecting the integrity of state elections?

Does *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which extended the court-created immunity doctrine to off-reservation commercial conduct and did not address state electoral processes, bar judicial enforcement of the PRA against Indian tribes, notwithstanding Article IV, section 4 and the Tenth Amendment?

III.

THESE QUESTIONS OF FIRST IMPRESSION SHOULD BE RESOLVED BY THE CALIFORNIA SUPREME COURT

While the FPPC agrees with the respondent's ruling in this matter, it also agrees with the petitioner that this court should resolve these questions of first impression. Only an appellate court can determine whether enforcement of the PRA by the FPPC is constitutional as applied to Indian tribes. Cal. Const. Art. III, § 3.5. The issues raised by the petition should be resolved by this court, consistent with respondent's ruling, for the reasons summarized in this letter brief.

The FPPC must enforce the PRA against all who fail to comply with its requirements for the safeguarding of elections and legislative processes against the corrupting influence of large money donors to candidates and elected officials. Cal. Const. Article III, section 3.5; Gov't Code § 81001.

Respondent court is correct that no case has held that a tribe is immune from suit for activities intended to influence a sovereign state's electoral and legislative processes. The *only* cases curtailing state court civil jurisdiction over tribes for *off-reservation* conduct--*Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756-760 (1998) and *Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384 (2001)--considered tribal economic transactions with private individuals or entities. Each applied the federal common law policy of deference to Congress in an arena in which Congress, by virtue of the Indian Commerce Clause, Article I, § 8, clause 3, has plenary authority. Neither case held or suggested that such immunity from suit would or could extend to tribal participation in state elections, power over which is reserved to the States by the Guarantee Clause, Article IV, § 4 of the United States Constitution through the Tenth Amendment. In this arena there is no basis for deference to Congress because the United States Constitution reserves power and authority to the States and limits the power of Congress.

This case presents as a question of first impression whether Article IV, section 4 and the Tenth Amendment of the United States Constitution constitute a limit on the scope of tribal sovereign immunity from suit. Respondent correctly resolved that question in this matter. Given the impending elections and the magnitude of financial participation of federally recognized Indian tribes, expeditious review by this court is needed.

IV.

FACTUAL AND PROCEDURAL BACKGROUND

The FPPC agrees with the petitioner's general procedural description of the case, but takes issue with petitioner's characterization of the evidentiary record and of respondent's ruling.

Petitioner errs in asserting that respondent should have determined only whether Congress affirmatively authorized exercise of state court jurisdiction or petitioner affirmatively waived its sovereign immunity from suit. (Petition p. 7). Respondent's ruling correctly determines that the States did not defer to Congress on such matters, when they delegated power over Indian commerce, but reserved the power to protect their republican form of government from congressional interference. Nor could the United States Supreme Court have contemplated, more than a century before Indians were granted state citizenship, that its court-created doctrine of sovereign immunity would so curtail powers reserved to the States, when it decided *Worcester v. Georgia*, 31 U.S. 515 (1832) and *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Even *Kiowa*, which declined

to revisit the Court's earlier decisions, recognized that the doctrine developed "almost by accident" and that Congress is "subject to constitutional limitations" in setting the scope of tribal sovereign immunity. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. at 759.

Petitioner asserts that tribal sovereign immunity from suit is the rule, not the exception. (Petition p.8) It fails to recognize that the rule applicable in this case is that Congressional intent to interfere with state sovereignty in the area of state elections cannot be inferred, but must be express. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Subject only to limits imposed by the United States Constitution, the Court held that such power "inheres in the State by virtue of its obligation . . . 'to preserve the basic conception of a political community.'" [citations omitted]. *Id.*

Nor does respondent's ruling apply a "balancing test" as petitioner asserts. (Petition p. 8). Respondent correctly determined that, unless the FPPC has the power of judicial enforcement, the institutions and processes of California's government would be subverted to a significant extent. This ruling is consistent with federal precedent. *See e.g., Fort Belknap Indian Community of Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428, 433-34 (9th Cir. 1994), *cert. denied* 516 U.S. 806 (1995) (without the power to prosecute violations, the state authority to regulate would be meaningless and the state's high interest unprotected).

Finally, the record does *not* reflect that "the information the FPPC seeks [from the tribe] is readily available to it." (Petition p. 10 n. 3). The second amended complaint (Ex. 1 to the Petition for Writ of Mandate) alleges that the tribe, according to its own records, made contributions of more than $1 million to California political candidates and committees from January 1, 1998 to June 30, 1998 and in the 1998 calendar year the tribe made contributions of more than $7.5 million to statewide ballot initiatives (¶ 11). It contributed to more than 140 candidates for elective state office (¶ 11). From July 1, 1998 to December 31, 1998, the tribe made contributions totaling at least $6 million (¶ 21). The tribe made similar contributions in 2001 (¶ 12) and 2002 (¶ 13). (Ex. 1 at pp. 3-4, 6).

Notwithstanding its status as a major donor committee, the tribe failed to file full and timely disclosure reports required by the PRA, thereby depriving voters of information necessary to make informed decisions. It did not file its report for the period January 1, 1998 to June 30, 1998 until October 2000, more than two years after the due date (¶ 19). The tribe filed an untimely report for the period July 1, 1998 through December 31, 1998 in March 1999 but only filed an amended final statement in November 2000, nearly two years after the due date. (¶ 22). (Ex. 1 at pp. 5-6).

More recently, in connection with the Proposition 51 ballot initiative, the tribe failed to disclose a contribution of $125,000 to the Yes on Proposition 51 Committee, using the Planning and Conservation League as an intermediary. If it had passed, Proposition 51 would have committed the expenditure of $15 million in public funds per fiscal year, for 8 years, for a rail line from Los Angeles to Palm Springs, including a train terminal at the tribe's Coachella Valley casino. (¶¶ 26-29). (Ex. 1 at p. 7).

In 1998 the tribe was one of the top 5 contributors to Yes on Proposition 5, Californians for Indian Self-Reliance, contributing more than $2,300,000 to the most expensive initiative campaign to that point in California history (¶ 37). The tribe entirely failed to disclose or only made untimely reports of several last-minute in-kind contributions to Yes on Proposition 5 totaling some $1 million (¶¶ 37-61). The complaint details additional undisclosed or late disclosures of contributions in the November 1998 general election, the March 2001 special election, the November 2001 general election, and the March 5, 2002 primary election. (Ex. 1 at pp. 8-15).

The tribe's quarterly lobbyist employer reports, required by the PRA, failed to identify the bills that were the subject of the tribe's lobbying efforts for any quarter of 2001 (¶¶ 85-98). (Ex. 1 at pp. 16-17).

The Declarations of Alan Herndon, Chief Investigator for the Enforcement Division of the FPPC (Ex. 14 to the Petition for Writ of Mandate) and James K. Knox, Executive Director of California Common Cause (Ex. 16 to the Petition for Writ of Mandate), showed that it is not possible to know the true extent of such contributions or activity, unless the tribe complies with the PRA's disclosure requirements. Nor can the FPPC accurately audit recipients' compliance. Certainly, voters cannot make informed decisions, when reports are untimely or incomplete.

Nothing in the record supports the petitioner's representation that all or any of this information was timely available either to the FPPC, or, more importantly, to the voters of California.

V.

SUMMARY OF ARGUMENT

A. The Doctrine of Tribal Sovereign Immunity From Suit Does Not Extend to Impair the State of California's Sovereign Power to Protect the Integrity of its Elections and Legislative Processes, Which Power is Reserved to the States by the Guarantee Clause through the Tenth Amendment of the U.S. Constitution

The FPPC agrees that the tribe, by virtue of its unique status, has rights of tribal self-government assiduously protected by Congress. This case in no way implicates those rights nor threatens that unique status. What is threatened is the State's sovereign power to protect the integrity of its elections and legislative processes.

In the wake of the Watergate scandal, the People of the State of California enacted the Political Reform Act by initiative in 1974. Among the charges to the FPPC under the PRA is that it "will be vigorously enforced." Gov't Code § 81002(f). As an administrative body, the FPPC must follow the statutory mandates of the PRA. Cal. Const. Article III, section 3.5.

It is the position of the FPPC, adopted by the superior court in this case, that the PRA constitutes an expression of core sovereign powers by the People of the State of California, powers reserved to the State under the Guarantee Clause, through the Tenth Amendment of the United States Constitution. The United States Supreme Court in *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) described the inherent sovereignty of the states that is invoked by the FPPC in this action:

> [I]t is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

Id. at 460.

In the same vein, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the United States Supreme Court struck down a provision of the Voting Rights Act of 1965 making eighteen-year-olds eligible to vote in state and local elections. Writing for the Court, Justice Black opined:

> On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother HARLAN has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, [footnote omitted.] the power to regulate elections.

Id. at 124.

On its face, the PRA is a clear mandate of the People of the State of California to preserve the integrity of their state and local political processes. The provisions of the PRA at issue regulate reporting of campaign contributions and expenditures of lobbyist employers. It is difficult to conceive of precepts more important to the state's sovereign political processes than these. *See National Federation of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1346 (S.D. Ala. 2002). As such, the State's power to enforce the PRA equally against all participants in its political processes is protected from abridgement by Article IV, section 4, through the Tenth Amendment to the United States Constitution.

Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), recognized that Congress has plenary authority over Indian commerce and may alter or limit tribal sovereign immunity. The Court pointed to congressional enactments limiting the scope of tribal sovereign immunity. The Court reluctantly applied the doctrine of tribal sovereign immunity from suit in the case before it, deferring to Congress. However, the Court also recognized constitutional limits to Congress' authority: "Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, *subject to constitutional limitations*, can alter its limits through explicit legislation. [Citation omitted.]" *Id.* at 759.

The Agua Caliente Band asserts that this case is on the same footing as the suit in *Kiowa*. However, *Kiowa*, and the cases relied upon by the United States Supreme Court in reaching its conclusion, simply did not involve tribal infringement upon a State's sovereign rights and powers guaranteed to the States by Article IV, section 4 through the Tenth Amendment. *Kiowa* expressly recognized the constitutional limits of congressional authority in describing the scope of the sovereign immunity from suit, and *Ashcroft* held that any such infringement of State rights by Congress must be express, not implied. *Ashcroft*, 501 U.S. at 464. Thus, to the extent that *Kiowa* has any application to the instant case, it supports the constitutional limitations to the doctrine recognized by the superior court in this case.

B. The Common Law Doctrine of Tribal Sovereign Immunity From Suit Has Not Been Extended to State Electoral Processes

Separate and apart from the State's Tenth Amendment protections, tribal sovereignty from suit has never been held to allow unregulated Indian tribal participation in state electoral and legislative processes.

Tribal sovereignty is of a "unique and limited character [and] exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler,* 435 U.S. 313, 323 (1978). "Indian reservations do not partake of the full territorial sovereignty of States or foreign countries." *Washington v. Confederated Tribes of Colville Indian Reserve,* 447 U.S. 134, 165 n. 1 (1980) (Brennan, J. concurring in part and dissenting in part). Further, if the tribe were a foreign nation for purposes of the PRA, it would be barred altogether from making campaign contributions by the Federal Election Campaign Act (FECA). 2 U.S.C. § 441e. "Foreign nationals" include individuals, partnerships, associations, corporations, organizations, or any other combination of individuals. 2 U.S.C. § 611 (a). The FECA proscription applies to federal, state and local elections (*U.S. v. Kanchanalak,* 192 F. 3d 1037, 1047 (D.C. Cir. 1999)) and is incorporated into the PRA by Government Code section 85320.

Indian tribes are "prohibited from exercising . . . powers 'inconsistent with their status.'" *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208 (1978). It is well-settled that off-reservation conduct of tribes, *absent a Congressional directive limiting state authority*, falls within the regulatory reach of states. *See Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973); *see also, Boisclair v. Superior Court,* 51 Cal. 3d 1140, 1158 (1990) (if primary situs of acts is outside Indian territorial boundaries, tribal defendants have acted beyond their sovereign authority and are not protected by sovereign immunity).

The decisions upon which petitioner relies, except *Kiowa* and *Redding Rancheria* (addressed above), dealt with limits on state power to enforce state laws *on* tribal lands. *Kiowa* and *Redding Rancheria* dealt with economic matters within the scope of the Indian Commerce Clause. *No* decision has addressed enforcement of non-discriminatory laws regulating off-reservation conduct that affects the integrity of state sovereign governments.

Where tribes have no tradition of sovereignty and where state sovereign interests are extraordinary, the courts have recognized that a necessary incident of the power to regulate is the power to enforce. This general proposition has been recognized both as an aspect of Indian and of state sovereignty.

Thus, for example, in *Babbitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983), *cert. denied* 466 U.S. 926 (1984), an Indian tribe was found to have authority to exercise civil jurisdiction over non-Indians conducting vehicle repossessions on reservation land. Because the regulations governing the conduct of non-Indians were a legitimate exercise of the tribe's inherent powers, civil jurisdiction to enforce the regulations was a "necessary exercise of tribal self-government." *Id.* at 598.

This same principle has been applied, even in the absence of express Congressional authority, where states have authority to regulate tribal conduct. *See Fort Belknap Indian Community of Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428 (9th Cir. 1994), *cert. denied* 516 U.S. 806 (1995). *Fort Belknap* dealt with regulation of liquor laws *in* Indian Country. Since there is no tradition of Indian sovereignty in this arena, "little if any weight" would be accorded to asserted interests in tribal sovereignty. *Id.* at 433. The court in *Fort Belknap* reasoned that, without the power to prosecute violations, the state authority to regulate would be meaningless and the state's high interest unprotected. *Id.* at 434.

For these additional reasons, respondent's ruling should be affirmed.

VI.

CONCLUSION

Respondent court correctly applied these principles of federal law to deny petitioner's motion to quash based on the federal court-created doctrine of tribal sovereign immunity from suit.

However, the FPPC agrees with petitioner that the issues presented by this petition should be resolved by this court. The FPPC must, unless or until enforcement of the PRA against Indian tribes is determined to be unconstitutional as applied, enforce the statute equally against all who violate its provisions. Cal. Const. Art. III, § 3.5. Nothing less than the State's ability to protect its sovereign form of government is at stake.

The FPPC strongly urges this court not to sanction the petitioner's proffered extension of the doctrine of tribal sovereign immunity in derogation of the State of California's constitutionally secured sovereign rights and powers. However, the FPPC recognizes that this is a case of first impression, in that no case has addressed the scope of the doctrine of tribal sovereign immunity in this context. As it can be anticipated that the petitioner and other federally recognized Indian tribes will continue to be very active in areas governed by the PRA, tribal sovereign immunity as a defense to enforcement actions under the PRA by the FPPC will be an ongoing point of contention until it is authoritatively resolved.

The FPPC requests that this court grant the petition, that it resolve this matter itself and that it affirm the ruling below.

Respectfully submitted,

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